

December 14, 2017

The Honorable Ajit Pai
Chairman
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Dear Chairman Pai:

For the following reasons, I support the current classification of internet access as a telecommunications service under Title II of the Communications Act, 45 U.S.C. § 151, *et seq.*, pursuant to the FCC’s 2015 Open Internet Order (the “Order”), FCC-15-24, and oppose the Commission’s current effort to repeal the Order. All references are incorporated as if set forth in full herein, and I respectfully request that the Commission include them in the administrative record.¹

The cornerstone of administrative regulation is “reasoned decisionmaking.” *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.* (“State Farm”), 463 U.S. 29, 52 (1983). As the D.C. Circuit recently explained to the Commission, this means that a reviewing court “must determine whether the FCC ‘examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made.’” *Glob. Tel*Link v. Fed. Commc’ns Comm’n*, 866 F.3d 397, 408 (D.C. Cir. 2017) (quoting *State Farm*, 463 U.S. at 43). “An agency acts arbitrarily or capriciously if it has ... offered an explanation either contrary to the evidence before the agency or so implausible as not to reflect either a difference in view or agency expertise.” *Defs. of Wildlife & Ctr. for Biological Diversity v. Jewell*, 815 F.3d 1, 9 (D.C. Cir. 2016) (citing *State Farm*, 463 U.S. at 43). “Reliance on facts that an agency knows are false at the time it relies on them is the essence of arbitrary and capricious decisionmaking.” *Mo. Pub. Serv. Comm’n v. FERC*, 337 F.3d 1066, 1075 (D.C. Cir. 2003); *accord. Animal Legal Def. Fund, Inc. v. Perdue*, 872 F.3d 602, 619 (D.C. Cir. 2017). Moreover, “[w]here an agency changes a policy or practice, it ‘is obligated to supply a reasoned analysis for the change.’” *Ark Initiative v. Tidwell*, 816 F.3d 119, 422 (D.C. Cir. 2016) (quoting *State Farm*, 463 U.S. at 42). Though an agency effecting a

¹ A Bates-stamped, .pdf version of the various references is attached hereto as Ex. 1, which includes a table of contents.

change in position “need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate,” *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (“*Fox*”), it still must do so “when, for example, its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account.” *Id.* (citing *Smiley v. Citibank (South Dakota), N. A.*, 517 U.S. 735, 742 (1996)).

The justifications put forth by the Commission as to the supposed need to repeal the Order have been repeatedly² debunked.³ In particular, the contentions that internet service providers (“ISPs”) have scaled back on broadband investment⁴ is⁵ patently⁶ false⁷, as is the claim that there were no net neutrality violations prior to the Order's enactment.⁸ The Commission is also refusing to consider evidence that Title II classification of broadband internet has resulted in measurable consumer protections and remediation of anti-net neutrality practices,⁹ and is likewise ignoring evidence that its public notice and comment process has been tainted by identity theft and fraud.¹⁰ The justifications put forward in support of the proposed order run counter to the evidence before the Commission, rendering its decision arbitrary and capricious, even under the more deferential standard announced in *Fox*. There are also serious reliance

² <https://www.dailydot.com/layer8/fcc-net-neutrality-facts-fact-checked/>

³ http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db1130/DOC-348016A1.pdf (unofficial announcement from Office of FCC Commissioner Mignon Clyburn)

⁴ <https://www.freepress.net/sites/default/files/resources/internet-access-and-online-video-markets-are-thriving-in-title-II-era.pdf>

⁵ <https://consumermediallc.files.wordpress.com/2016/12/comcasttranscript.pdf> at 3 (Mike Cavanagh, Comcast EVP & CFO stating on Dec. 7, 2016: “The broadband business just is a fantastic business, so it's -- we've been investing, again, heavily in making that the best product...”)

⁶ https://www.freepress.net/sites/default/files/resources/capital_expenditures_by_publicly_traded_ISPs.pdf

⁷ <http://www.businessinsider.com/fccs-claim-that-broadband-investment-has-dropped-is-flawed-2017-11>

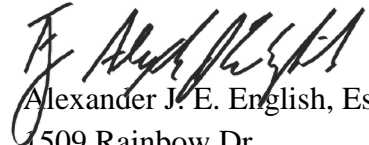
⁸ <https://www.freepress.net/blog/2017/04/25/net-neutrality-violations-brief-history>

⁹ <https://medium.com/latinx-mic/the-fcc-is-ignoring-50-000-consumer-complaints-as-it-moves-forward-to-repeal-net-neutrality-7e64a5e66a7a>; see also <https://www.fcc.gov/response-nhmc-foia-request>

¹⁰ <https://medium.com/@AGSchneiderman/an-open-letter-to-the-fcc-b867a763850a>

interests that have come into existence since the Order was announced,¹¹ meaning the Commission still must meet a heightened burden of scrutiny. Because the Commission's proposed change in policy is arbitrary, capricious, and otherwise not in the public interest, I respectfully oppose its efforts to repeal the Title II reclassification of broadband ISPs as a telecommunications service.

Respectfully Submitted,


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¹¹ See, e.g., June 27, 2017 letter to the Commission from over 40 small ISPs, in support of the Order: https://www.eff.org/files/2017/06/27/isp_letter_to_fcc_on_nn_privacy_title_ii.pdf